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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF TO OPPOSITIONS OF ARCHER DANIELS MIDLAND COMPANY AND DIRECTORS OF ARCHER DANIELS MIDLAND COMPANY

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Respondents Archer Daniels Midland Company ("ADM") and Directors of ADM ("Directors") do not deny that this case presents an irreconcilable circuit split over nonparty shareholder appeals. Nor do they challenge the importance of the issue to the appellate rights of an entire class of litigants and the judiciary's ability to police collusive derivative suit settlements. Pet. 13-17. ADM and the Directors simply defend the Seventh Circuit's result. But even they ultimately abandon its reasoning, conceding that neither *Marino v. Ortiz*, 484 U.S. 301 (1988), nor Fed. R. App. P. 3(c), bars all nonparty appeals. Point 3, *infra*.

ADM and the Directors likewise do not and cannot seriously dispute that this case raises a second, distinct split with the Ninth Circuit over whether courts reversing settled jurisdictional precedents have the power to consider prospective application of their decisions. Pet. 23-25. They do not dispute the importance of this issue. Pet. 25-26. And, again, they do not and cannot defend the Seventh Circuit's reasoning, seeking instead to defend its result primarily on alternative grounds. Point 4, *infra*.

1. Unable to contest that the circuits *do* disagree over nonparty shareholder appeals, ADM rests its opposition on the panglossian assertion that the split is sure to resolve itself at some (unspecified) future date. ADM Opp. 8-14. But such wishful thinking is no basis for ignoring a split the parties and lower courts concede is real and live—only an invitation for perpetuating confusion among the courts of appeals and uncertainty for litigants. Besides, ADM provides no factual basis for its speculation.

First, not one of the cases ADM cites as evidence of supposed impending resolution involves a shareholder appeal under Rule 23.1. Instead, each involves the separate circuit split over the propriety of nonparty Rule 23 class action appeals. *See* ADM Opp. 8 (citing cases). The Rule 23 split, however, is not presented by this petition (*see* Pet. i, Question Presented 1), and lower courts have suggested that the case for nonparty appeals is analytically

different—and stronger—for Rule 23.1 shareholders than for Rule 23 class members.[1]

Second, even if developments in the Rule 23 class action split had some bearing on certiorari in this case, ADM's assurances of resolution are demonstrably incorrect. Within the last five years, the Second, Third, and Sixth Circuits have issued post-*Marino* decisions reaffirming the right of nonparty class action litigants to appeal.[2] In fact, contrary to ADM's express representation, the most recent circuit decision to address the issue found the split so nettlesome that to avoid controversy and protect its decision from certiorari it assumed without deciding that non-

[1] *See Gottlieb v. Wiles*, 11 F.3d 1004, 1011 (10th Cir. 1993) (McKay, C.J.) (citing *Bell Atlantic* and arguing that case for Rule 23.1 nonparty appeals is stronger for three reasons: because "[u]nlike class actions under Rule 23, in shareholder derivative suits under Rule 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interest of other class members is not a prerequisite"; "there is no opt-out provision in shareholder derivative suits. Thus, all shareholders are bound by the outcome regardless of their objections"; and "one of the risks peculiar to shareholder derivative actions is that [p]laintiffs' attorneys and the defendants may settle in a manner adverse to the interests of the plaintiffs by exchanging a low settlement for high fees") (citations omitted). *See also Rosenbaum v. MacAllister*, 64 F.3d 1439, 1442 (10th Cir. 1995) ("[i]ndeed, the decision [*Gottlieb*], by its analysis distinguishing shareholders' derivative suits and *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), might be read to support Russell's standing to appeal the derivative suit portion of the settlement agreement").

[2] *See* Pet. 12 n.10, citing *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1061 (6th Cir. 1994) (expressly considering *Marino* and holding that it "addressed the standing to appeal of non-parties and not . . . of non-representative members of a class or derivative suit" and thus does not overrule caselaw permitting certain nonparty class member appeals); *In re PaineWebber Inc. Ltd. Partnerships Litig.*, 94 F.3d 49, 53 (2d Cir. 1996) (even though motion to intervene denied, nonparty class members may appeal final judgment); *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993) (upholding class member's right to appeal and expressly rejecting *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675 (9th Cir. 1992) and *Walker v. City of Mesquite*, 858 F.2d 626 (11th Cir. 1987), which had relied on *Marino* to forbid such appeals).

party class members can appeal. *New York v. Reebok Int'l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) ("in view of the differences in the circuits on the issue of the appellate standing of unidentified class action members, we deem it advisable also to review the merits of appellants' claims"). That is hardly the mark of a split resolving itself.

ADM dwells on the fact that the Court previously denied petitions in two cases. ADM Opp. 9-11. But both cases were Rule 23 class actions; ADM fails to cite a single post-*Marino* Rule 23.1 petition considered by the Court, and petitioners are aware of none. Both of the class action cases ADM cites were, moreover, obviously poor vehicles for resolving even that distinct split. By the time *Weinberg v. Croyden Associates* reached the Court, both respondents had entered bankruptcy and, thus, any opinion rendered by the Court would have had no binding impact on the parties to that case. *See* Brief in Opposition at 23-25 (No. 92-613, filed Dec. 23, 1992). In *Ridgeway v. Pfizer, Inc.* (where petitioners twice sought review), respondents devoted an entire section of their brief to arguing "THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT," noting among other things that the class members seeking review had attempted to challenge the settlement only after affirmatively choosing to accept (and apparently failing to repudiate) its benefits. *See* Briefs in Opposition at 11-12 (Nos. 93-1912 and 94-843, filed July 1, 1994, and Dec. 8, 1994).

Third, if ADM *were* correct that the lower courts are gradually coming to conclude that *Marino* bars Rule 23.1 nonparty shareholder appeals, that would only further underscore the need for the Court to correct a serious misunderstanding of its brief and largely unexplained *per curiam* precedent. Indeed, even ADM and the Directors *concede*—in conflict with *Marino*'s dicta and the Seventh Circuit's holding—that *Marino* and Fed. R. App. P. 3(c) do not bar all nonparty appeals. *See* Point 3, *infra*.

2. Respondents do not (and cannot) contest that at stake in the Rule 23.1 split is whether an entire class of

persons have a right to appeal or may do so only with the discretionary concurrence of the trial court. Pet. 13-17. Nor do (or can) they dispute that the quality of justice administered by federal courts in derivative litigation is directly implicated: requiring shareholders to assume the costs and burdens of parties will decrease the likelihood of their participation and increase the opportunities for improper and collusive settlements to evade judicial detection. Pet. 14-15; *Bell Atlantic*, 2 F.3d at 1310.[3]

Instead, ADM responds only that "gigantic organizations like petitioners" can afford to become parties. ADM Opp. 16. But obviously not all dissident shareholders have petitioners' resources; if petitioners' resources are relevant at all to the question of certiorari, they weigh in favor of granting review.[4] Nor can respondents seriously dispute that even large institutional shareholders often find prohibitive the costs and burdens of becoming a party in modern commercial litigation (including submission to often unlimited depositions, compliance with Rule 26(a), and other discovery demands). *See* Remarks of District Judge Vaughn R. Walker, ABA National Securities Litigation Institute, June 5, 1998.[5] Nor do respondents have any meaningful response to the fact that, even for shareholders willing and able to assume such burdens, current law in the Seventh Circuit and elsewhere strongly disfavors intervention where (as in Rule 23.1 practice) the motion to intervene comes after a tentative settlement is reached. Pet. 16 & n.18; *id.* at 7 n.7.[6]

3. ADM and the Directors spend much of their briefs arguing the correctness of the Seventh Circuit's intervention mandate. *See* ADM Opp. 14-18; Directors Opp. 13-19. But such merits arguments only underscore the deep disagreement over nonparty shareholder appeals requiring this Court's attention.

Tellingly, too, while ADM and the Directors defend the Seventh Circuit's result, they abandon its reasoning. Confronted by overwhelming evidence that nonparty appeals are routine (Pet. 20-21), ADM and the Directors frankly concede that at least some nonparty appeals *are* permissible. *See* ADM Opp. 14 n.6; Directors Opp. 17. This admission is in direct conflict with *Marino*'s dicta and the Seventh Circuit's holding that "only parties may appeal." Pet. App. 3a; 484 U.S. at 304. Nor do (or can) respondents harmonize their endorsement of some

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[3] ADM and the Directors likewise offer no rejoinder to the fact that leaving this split unresolved leaves shareholder litigants uncertain of their appellate rights and the procedures they need to follow (Pet. 16), and encourages forum shopping (Pet. 17).

[4] Unlike many dissident shareholders, petitioners have the financial wherewithal to provide merits briefs and oral argument comparable to those provided by respondents' able counsel. Moreover, petitioners have used their resources to contact a number of other institutional investors who have authorized petitioners to inform the Court that they stand ready to provide *amici* filings should the Court grant review. These include the Colorado Public Employees' Retirement Association, Louisiana State Employees' Retirement System, Massachusetts Pension Reserves Investment Management Board, Missouri State Employees' Retirement System, New Jersey Division of Investment, New York City pension funds, New York State Common Retirement Fund, United Food and Commercial Workers International Union Staff Trust Fund, and State of Wisconsin Investment Board.

[5] "[I]nstances of institutional investors actively leading a [securities class] litigation effort remain relatively rare. . . . This is no surprise. As Professors Weiss and Beckerman recognized, institutional investors have disincentives to becoming [parties]. . . . Lawsuits are costly in time, money and other resources." *Id.* at 7-8. After touting petitioners' supposed resources, respondents ironically go on to malign petitioners for using them to promote corporate governance standards (*see* Directors Opp. 6; ADM Opp. 16) aimed at preventing a repeat of the ADM fiasco where the company has admitted multiple acts of criminal wrongdoing (Pet. 4) and top officials are currently in the middle of a federal criminal trial.

[6] Respondents purport to assure the Court that intervention will not be a problem. *See* ADM Opp. 16; Directors Opp. 14-15 & n.2. But they cite no cases to support their assurances. And they do not dispute that the Seventh, Second, and Fifth Circuits strongly disfavor post-settlement intervention. Respondents are left only to offer sheer speculation that courts will (sometime) in the future create a special exception for shareholder litigants.

nonparty appeals with the Seventh Circuit's reading of Fed. R. App. P. 3(c) as restricting appellate jurisdiction to formal parties. *See* Pet. 22-23; Pet. App. 2a, 3a.

ADM and the Directors attempt to limit their retreat by suggesting that only nonparties "personally addressed" by trial court orders may appeal. *See* ADM Opp. 14 n.6; Directors Opp. 17. But neither *Marino* nor the Seventh Circuit ever suggested such a rule, and respondents fail to cite any court that has. Indeed, their proffered rule is inconsistent with common law practice permitting unnamed class members to appeal (Pet. 18); with this Court's longstanding jurisprudence allowing *all* "priv[ies] to the record" to appeal (Pet. 19); *United States ex rel. Louisiana v. Boarman*, 244 U.S. 397 (1917)[7]; and with federal appellate practice which has routinely permitted unnamed privy nonparty appeals. *See, e.g.*, Pet. 21 & n.24 (citing cases where unnamed persons legally liable to reimburse defendant for amounts paid in judgment were permitted to appeal); Pet. 21 & n.23 (citing cases where unnamed attorneys were permitted to appeal trial court orders denying a fee request made by a party). *See also* 15A Charles A. Wright, *et al., Federal Practice and Procedure* § 3902.1, at 122 (2d ed. 1992) (named nonparty presents "easiest" but not exclusive case for appeal); *id.* at 126 (though order does not "bind a nonparty by name," he may appeal when order has "[o]bvious and important effects" on him). Even if respondents' rule had some

[7] ADM cites *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) and *Karcher v. May*, 484 U.S. 72, 77 (1987) for the proposition that only parties may appeal. ADM Opp. 14. But ADM itself inconsistently admits that at least some nonparties can appeal. And neither case suggests otherwise. *Id.* 14 n.6. Besides, *Louisiana* explained that *Ex parte Leaf Tobacco Bd. of Trade* stands only for the proposition that parties *and* nonparty privies may appeal. 244 U.S. at 402. And *Karcher* expressly acknowledged that one who is a party "or has . . . been treated as a party" may appeal. 484 U.S. at 77. *See also, e.g., Bayard v. Lombard*, 50 U.S. (9 How.) 530, 551 (1850) (parties and privies may appeal); *Ex parte Cockcroft*, 104 U.S. 578, 579 (1882) (actual parties or ones "treated as such" by trial court may appeal).

basis in law rather than in their imagination, they fail to explain how it would forbid appeals by shareholders who, like petitioners, had their objections personally and specifically overruled by the trial court.[8]

ADM and the Directors repeatedly denigrate the Third Circuit's decision in *Bell Atlantic* as poorly reasoned. *See, e.g.*, ADM Opp. 8; Directors Opp. 11. Yet they never confront the Third Circuit's holding that *Marino* barred only complete strangers (white police officers) from attacking a settlement between plaintiff class members (black officers) and the defendant (police administration), and did not involve the appellate rights of class members themselves. 2 F.3d at 1308 n.6; Pet. 19. They fail to note that, unlike the Seventh Circuit's decision, *Bell Atlantic's* reading of *Marino* is consistent with this Court's prior holding in *Louisiana* and other cases, common law practice, and regular federal decisions permitting nonparty privy appeals. They fail to inform the Court that *Bell Atlantic* has been approvingly cited twice by the Tenth Circuit (*see supra* note 1); that the Third Circuit has subsequently acknowledged its continuing conflict with other circuits and unflinchingly adhered to its own view (*see Carlough*, 5 F.3d 707); that its reasoning was subsequently adopted by the Sixth Circuit in the class action context (*see Shults*, 35 F.3d at 1056); or that commentators have repeatedly endorsed its view.[9] Meanwhile, re-

[8] *See* Hearing Tr. at 79 ("All right. The court's ready to rule. Having heard the remarks of the proponents of the settlement and the remarks of those in opposition [*i.e.*, petitioners], the court concludes that the settlement, which is before the court is fair, reasonable, and adequate.").

[9] ADM tries to twist Wright & Miller's acknowledgment that "it has been ruled" by some courts that shareholders must intervene into support for those decisions. ADM Opp. 15. But Wright & Miller's view could not be more clear that, despite *Marino*, "[t]he justification for recognizing appeal standing in some of these [nonparty] cases is so compelling as to justifying putting aside any formal requirement of intervention, although the 'better practice' is to seek intervention in the district court." 15A Wright, *et al., supra*, § 3902.1, at 122 (quoting *Marino*, 484 U.S. at 303). ADM is

spondents are unwilling (and unable) to defend the Seventh Circuit's alternative reading of *Marino* and Fed. R. App. P. 3(c) as barring all nonparty appeals.[10]

4. Respondents label *George v. Camacho*, 119 F.3d 1391 (9th Cir. 1997) (*en banc*) a "peculiar" decision and assert it was based on "extremely unusual facts." *See* ADM Opp. 19; Directors Opp. 21. But perjoratives aside, they can hardly deny the existence of a split: the Ninth Circuit in *George* held that courts have the power

similarly incorrect when it represents that "the only authority" Wright & Miller cites in support of its endorsement of nonparty shareholder appeal is a "pre-*Marino*" decision. *Compare* ADM Opp. 15 *with* 7C Wright, *supra*, § 1839 n.22 (Supp. 1998) (expressly relying on *Bell Atlantic*). ADM is incorrect yet again when it states that the only post-*Marino* cases Moore cites in favor of nonparty shareholder appeals are from the Third Circuit; in fact, Moore also cites the Tenth Circuit's decision in *Rosenbaum*. 5 J. Moore, *Moore's Federal Practice* § 23.1.10[3] n.36 (3d ed. 1998). ADM's citation to Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 n.137 (1967) deals exclusively with Rule 23 class members and states only that by objecting class members do not automatically become parties; it is silent as to their appellate rights as nonparty objectors. ADM Opp. 16 n.10. And ADM does not even attempt to respond to *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933, 946 (1993), cited favorably by the Seventh Circuit below (Pet. App. 2a), which expressly endorses petitioners' (and *Bell Atlantic*'s) view of *Marino*.

[10] ADM fleetingly attempts to defend the Seventh Circuit's decision on the alternative ground that the appellate courts will be overburdened if nonparty shareholders were allowed to appeal. ADM Opp. 18 n.12. But this merits argument only underscores ADM's disagreement with courts (like the Third Circuit) that stress the importance of shareholder participation to preventing and exposing improper settlements. 2 F.3d at 1310. Besides, nonparty shareholder appeals have been routinely heard for decades in the Seventh Circuit and elsewhere without incident; ADM cites no court or judge complaining of undue burden, nor a single commentator on the subject. In fact, the only "evidence" ADM can muster from decades of practice permitting nonparty shareholder appeals is citation to a single dispute, and even that case involved a Rule 23 class action, not a shareholder appeal.

to consider overruling existing jurisdictional precedents only prospectively (2 F.3d at 1398); the Seventh Circuit below held that they do not (Pet. App. 7a-8a, 10a). The Seventh Circuit expressly acknowledged its "disagree-[ment]" with *George* on this score; stated that its opinion "was circulated before release to all judges in active service" because it "creates a conflict among the circuits" (Pet. App. 10a); and "overrule[d]" its own precedent, *Snyder v. Smith*, 736 F.2d 409, 415 (7th Cir. 1984), because it had previously "reached the same conclusion" as *George*. Pet. App. 8a.[11]

Respondents do not attempt to contest petitioners' explanation of the importance of the interests at stake in the split. Pet. 26. ADM does not even attempt to defend the correctness of the panel's decision below; the Directors' attempts to do so at best underscore the depth of their disagreement with the Ninth Circuit, and at worst are simply incoherent.[12] In the end, ADM and the Direc-

[11] *Cf. Prettyjohn v. Shalala*, 23 F.3d 1572, 1575 (10th Cir. 1994) (like Ninth Circuit, holding over dissent that court has power to consider prospective adjudication).

[12] The Directors assert that the court of appeals lacked adjudicatory power to hear petitioners because they were not parties. Directors Opp. 23 (court requires "'adjudicatory power' over Petitioners . . . as parties"). But this claim is literally incoherent given the Directors' own admission that courts of appeals do possess the power to hear at least some nonparty appeals. *Id.* 17 (conceding circuit courts may hear appeals from "order[s] formally addressed to a nonparty"). The Directors explain *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), on the grounds that it permitted prospectivity in a jurisdictional dispute "only to avoid inequitable results." Directors Opp. 24. But this does nothing to insulate the court of appeals' assertion that it was *powerless* to consider inequitable results in this case. Pet. App. 10a ("[e]quitable considerations are altogether irrelevant"). And still no respondent has addressed the Ninth Circuit's analysis that *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) and *Christianson v. Colt*, 486 U.S. 800 (1988), simply do not control where (as in *George* and here) the court announces a new rule of law, or effects a change in the law. Pet. 29-30.

tors seek to defend the Seventh Circuit primarily on alternative grounds—arguing that "even if" the Seventh Circuit had held itself empowered to consider pure prospectivity, it would have declined to exercise that power in this case because petitioners could have divined the court's intention to make intervention mandatory. ADM Opp. 20-21; Directors Opp. 22.

Respondents' speculation about how the Seventh Circuit would have balanced the equities in this case is utterly irrelevant. The only question presented in this petition is whether courts have the legal *power* to consider prospective application of jurisdictional decisions overruling prior precedent. Whether a court of appeals would choose to *exercise* such power in this particular case is a question of applying law to the facts that become relevant only upon remand to the Seventh Circuit. Besides, respondents can offer only sheer guesswork for their claim that a court of appeals would find the equities in this case insufficient to warrant prospectivity; the Seventh Circuit expressly declined to reach the question. *See* Pet. App. 10a (ending opinion after holding itself powerless to balance equities favoring prospective and retroactive adjudication). And, in fact, petitioners have several unanswered arguments favoring prospectivity to make on remand: before the decision below, the Seventh Circuit had directly held that a nonparty shareholder's right to appeal was "clear" (*Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976)); the Third Circuit had written a post-*Marino* opinion only four years earlier reaffirming the Seventh Circuit's view; the Tenth Circuit had approvingly cited the Third Circuit's opinion (*see supra* note 1); not a single published post-*Marino* case existed refusing a nonparty shareholder appeal; and leading commentators had expressly endorsed the Third Circuit's analysis. *See also* Pet. Reply 2-4.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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